Refugee Council of Australia

SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE ON HUMAN RIGHTS EXAMINATION OF THE MIGRATION (REGIONAL PROCESSING) PACKAGE OF LEGISLATION

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 160 organisations and 700 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members and refugee background communities and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the regional processing package of legislation. While RCOA agrees that the loss of life resulting from dangerous sea journeys to Australia must be urgently addressed, we believe that many of the measures proposed by the Expert Panel on asylum seekers and subsequently implemented by the Government do not provide an acceptable or effective means of addressing this issue. The reinstatement of offshore processing in Nauru and Papua New Guinea's Manus Island, the changes to the Minister's guardianship obligations towards unaccompanied minors, the excision of the Australian mainland from the migration zone and the changes to Australia's humanitarian family reunion policy will in no way enhance Australia's compliance with the seven core human rights treaties or the enjoyment of human rights in Australia. On the contrary, these measures will place Australia in breach of its international obligations and significantly impede the enjoyment of basic human rights by people who are entitled to protection and assistance.

This submission builds on the verbal evidence provided to the Committee in December 2012, highlighting the specific human rights implications of the package of legislation. It excludes detailed consideration of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, as RCOA has already made a separate submission on this Bill to the Legal and Constitutional Affairs Committee.[1]

1. Predicted effectiveness of the legislation

1.1. The re-establishment of offshore processing in Nauru and Papua New Guinea was envisaged by the Expert Panel as a "circuit breaker" to stem the current surge in boat arrivals to Australia. RCOA is doubtful that this policy will have the desired effect.

1.2. Proponents of offshore processing frequently point to the dramatic decrease in boat arrivals following the establishment of the Pacific Solution as evidence of the policy's success. In assessing the potential effectiveness of offshore processing in reducing boat arrivals to Australia, however, it is important to consider the broader international context within which Australia's domestic policies operate. When the Pacific Solution was established in 2001, for example, the Taliban was months away from being overthrown by international forces, paving the way for the voluntary repatriation of Afghan refugees on an unanticipated scale; the sectarian violence which triggered the current refugee crisis in Iraq had not yet begun; and the belligerents in the Sri Lankan civil war were soon to enter peace talks which led to the signing of a ceasefire in early 2002.

[1] RCOA's submission on *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* is available at http://www.refugeecouncil.org.au/r/sub/1212-Excision.pdf.

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1.3. Since the Pacific Solution was abolished, the international context has changed dramatically. The resurgence of the Taliban has resulted in the progressive deterioration in security conditions in Afghanistan; the outbreak of sectarian violence in Iraq in 2006 catalysed a dramatic increase in the Iraqi refugee population; and the breakdown of the Sri Lankan ceasefire in 2006 led to the resumption of hostilities and the eventual defeat of the Liberation Tigers of Tamil Eelam, triggering large-scale flight of Tamil refugees. More recently, the outbreak of violence in Burma's Rakhine State has prompted a new wave of flight by Rohingya refugees.

1.4. Conditions in several major countries of asylum have also declined: violent attacks against Hazaras in Pakistan (including Afghan refugees) are on the rise; the situation in Syria – a major host country for Iraqi refugees – has deteriorated rapidly as the country has descended into civil war; and the Government of Bangladesh has adopted an increasingly hostile attitude towards refugees arriving from Burma. Not only have these developments made living conditions for refugees far more difficult, they have also hampered access to durable solutions. The volatile security conditions in Syria have hindered access to resettlement, and Bangladesh is currently refusing to cooperate with resettlement processes of the United Nations High Commissioner for Refugees (UNHCR). Pakistan is hosting 1.7 million officially registered refugees – more than any other nation in the world – but fewer than 1,000 refugees (less than 0.06%) have been resettled from Pakistan through UNHCR processes over the five years to December 2012. In an environment of increasing insecurity and regular public threats from the Government of Pakistan to return all Afghan refugees to Afghanistan, it is not at all surprising that Afghan refugees are leaving Pakistan in increasing numbers to seek greater protection elsewhere.

1.5. The problems within Asia and the Middle East are indicative of a wider global problem of a lack of access to durable solutions for the world's refugees. Of the 10.4 million refugees under UNHCR's mandate, more than two-thirds (7.1 million) are in what are classified as "protracted refugee situations" with no durable solution in sight through safe voluntary return, local integration in the country of asylum or resettlement to a third country. The average length of displacement for those 7.1 million refugees is between 15 and 20 years. Senior UNHCR staff have acknowledged that the failure to find protection solutions for refugees is one of the most significant factors in onward movement of refugees, with families working together to sell assets or borrow heavily to send one or more family members further afield to seek a way out of the protection crisis experienced by the whole family. This global picture is reflected in the personal experiences of many of the asylum seekers reaching Australia by boat, the majority of whom are young adult males who are seeking to support family members in dire circumstances and to assist them to a place of greater safety.

1.6. In summation, the key differences between the international context which provided the backdrop for the Pacific Solution and the current context are, firstly, that the "push factors" driving forced displacement and onward moving are now far more compelling, particularly for groups facing immediate threats to their physical safety; and there are fewer prospects for securing timely durable solutions due to ongoing or declining conditions in countries of origin (precluding voluntary repatriation) and asylum (precluding local integration and, in some cases, resettlement). In light of these factors, it is highly questionable whether the reinstatement of offshore processing will have the "circuit breaker" effect envisaged by the Panel.

1.7. Indeed, in the six months since the release of the Panel's report, the total number of asylum seekers who have arrived in Australia by boat was greater than for any previous six-month period in Australian history – and, in fact, higher than any previous annual total. Between 13 August 2012 and 11 April 2013, 14,184 asylum seekers reached Australian territory by boat, well exceeding the previous annual record of 8,092 in 2011-12.[2]

[2] Source: Department of Immigration and Citizenship.

1.8. RCOA also has serious doubts as to whether the changes to Australia's family reunion policies will reduce boat arrivals to Australia. On the contrary, we fear that blocking access to "regular" channels for family reunification will lead to an increase in family groups undertaking dangerous journeys. This trend was seen under the Temporary Protection Visa (TPV) policy, whereby refugees who had arrived by boat were granted temporary visas and were not permitted to sponsor family members for resettlement. In the two years after TPVs were introduced, the number of children arriving by boat to seek asylum was more than 19 times higher than for the two years prior to the introduction of TPVs, while the number of female asylum seekers increased 16-fold. The number of minors increased from 128 in the two years to 31 October 1999 to 2,461 in the two years following, while the number of female asylum seekers increased from 128 to 2,041. Overall, there was a five-fold increase in asylum seekers arriving by boat, from 1,953 to 10,217.[3] Of the 353 people killed in the SIEV X boat tragedy in 2001, 142 were women and 146 were children, some of whom were attempting to reunite with husbands and fathers already in Australia on TPVs.

1.9. We acknowledge that the Government, in line with the Panel's recommendations, has allocated additional places to the family stream of the general migration program to provide an alternative avenue for refugees who no longer have access to family reunion through the humanitarian program. However, as outlined in further detail in Section 4 of this submission, the conditions and requirements of the general migration program will render this option impracticable for many refugee families.

1.10. Regardless of whether the policies implemented to date do eventually prove effective in reducing boat arrivals, however, they do not present an acceptable means of addressing the problem. RCOA's central concern relating to this package of legislation is that it is likely to have serious consequences for the enjoyment of human rights by people seeking protection. In fact, the success of the deterrence-based policy approach currently being pursued by the Government is fundamentally at odds with a rights-based approach, as it essentially depends on hampering the enjoyment of human rights.

1.11. In the words of the Panel, the aim of its proposed measures relating to offshore processing and family reunion is to "reduce the attractiveness of Australia as a destination point for irregular migration"[4]. The the key factors which make Australia an "attractive" destination point for asylum seekers, however – such as physical and legal security, protection against persecution and violence, democratic institutions, a strong rule of law and access to education, employment and health care – relate to the enjoyment of basic human rights. As such, reducing Australia's "attractiveness" to asylum seekers will inevitably result in the weakening of human rights protections and is likely to bring Australia into breach of its international human rights obligations.

1.12. The specific human rights implications of this package of legislation are discussed in further detail in the following sections.

2. Implications of offshore processing for enjoyment of civil and political rights

2.1. The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* failed to introduce any meaningful safeguards to protect the human rights of asylum seekers and refugees subject to offshore processing. In fact, the legislation *removes* existing safeguards and allows the Minister for Immigration and Citizenship to exercise a high degree of discretion in designating countries for offshore processing. The mechanism of parliamentary scrutiny has clearly not been sufficient to prevent breaches of rights. Indeed, the conditions under which asylum seekers in offshore facilities are being held breach a range of civil and political rights to the degree that, in RCOA's view, is tantamount to inhumane and degrading

[3] Budget Estimates 2012-2013, Immigration and Citizenship Portfolio, Tabled documents, 21 and 22 May 2012, Answer to question BE12/0265 - www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/bud_1213/diac/index.htm
[4] Houston, A., Aristotle, P. & L'Estrange, M. (2012). *Report of the Expert Panel of Asylum Seekers*. Commonwealth of Australia, http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf; p. 12.

treatment. Additionally, the policy discriminates against a specific group of asylum seekers on a basis that is not valid or reasonable.

2.2. ***Arbitrary detention (Article 9 of ICCPR):*** While it is understood that the offshore processing facilities in Nauru and Manus Island will eventually operate on a more "open" model, the asylum seekers currently residing in these facilities are being detained on a mandatory, indefinite basis, without an individualised assessment of the necessity and proportionality of detention. At present, it appears the main reasons for the ongoing detention of these asylum seekers is that the facilities are still under construction and that Nauru and Papua New Guinea do not yet have the capacity to commence processing of refugee claims. In RCOA's view, the detention of these asylum seekers cannot be justified on such a basis, particularly considering that the arrival of these asylum seekers in Nauru and Papua New Guinea was deliberate and planned. Furthermore, it is apparent from UNHCR reports that legal safeguards and clear processes to enable asylum seekers to challenge the lawfulness of their detention are lacking.[5] RCOA therefore considers the detention of asylum seekers in offshore facilities to be arbitrary. However, we are also concerned that, even if the facilities do move towards a more "open" model, the remote location and restrictiveness of the physical environment are likely to create a detention-like environment for these individuals, even if they are not confined to a closed facility.

2.3. ***Humane treatment in detention (Article 10 of ICCPR):*** Amnesty International Australia[6] and UNHCR have described the physical conditions of detention in the Nauru and Manus Island facilities as harsh, onerous and repressive. Both organisations have expressed concern about the lack of adequate protection against the elements (particularly the heat, humidity and heavy rains), the rudimentary nature of accommodation, crowded conditions and lack of privacy. Statements from the Australian Government asserting that standards in the Manus Island facility are in line with living standards for local residents does not, in RCOA's view, provide a reasonable justification for these poor conditions. Papua New Guinea is one of the largest recipients of Australian overseas development assistance precisely because the living standards of much of its population are unacceptably low, to the point where many do not enjoy even basic human rights. The argument that conditions in the Manus Island facility are on par with local living standards should be considered an indictment, not a defence.

2.4. ***Freedom of movement (Article 12 of ICCPR):*** At present, asylum seekers in Nauru and Manus Island do not have freedom of movement. They are housed in a restrictive, fenced environment which they cannot leave without being accompanied by a service provider. While it is intended that the facilities will eventually move towards a more "open" model, it remains unclear to what extent asylum seekers and refugees will have freedom of movement throughout Nauru and Papua New Guinea. Of particular concern is whether people found to be refugees will have the freedom to depart Nauru or Papua New Guinea with right of return. If this is not the case, conditions for asylum seekers and refugees facing long-term exile in these territories may be akin to prolonged detention, particularly for those who are separated from their families. It is also notable that Papua New Guinea currently has a reservation against Article 26 of the Refugee Convention, which requires states to allow refugees to have freedom of movement to the same degree as other non-citizens lawfully in their territory.

2.5. ***Privacy (Article 17 of ICCPR):*** As noted above, both Amnesty International Australia and UNHCR have expressed concern about the lack of privacy for asylum seekers detained in the Nauru and Manus Island facilities. Asylum seekers in Nauru are currently housed in crowded tents in a small compound where there is, in the words of Amnesty International, "simply no privacy for the men". Many single adult males are also being housed in tents in the Manus Island facility,

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[5] See UNHCR (2012). *UNHCR Mission to the Republic of Nauru*, http://unhcr.org.au/unhcr/images/Amended%20footnote%202012-12-14%20nauru%20monitoring%20report%20final_2.pdf; and UNHCR (2013). *UNHCR Mission to Manus Island, Papua New Guinea*, http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf. Subsequent references to UNHCR's comments on conditions in offshore facilities are based on these two reports.

[6] Amnesty International Australia (2012). *Nauru Offshore Processing Facility Review 2012*, http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf. Subsequent references to Amnesty International Australia's comments on conditions in the Nauru facilities are based on this report.

and many of the temporary shelters used to house family groups do not have doors or blinds for the windows. Furthermore, the lack of air-conditioning inside the shelters has compelled some asylum seekers to sleep outside in communal areas so as to escape the heat.

2.6. ***Prevention of torture and cruel, inhumane and degrading treatment or punishment (CAT and Article 7 of ICCPR):*** The current living conditions in offshore facilities described above are, in RCOA's view, tantamount to inhumane and degrading treatment. Even if these conditions are improved, however, the nature of offshore processing in itself represents a breach of Australia's international obligations. Conditions in Australian immigration detention facilities, for example, are far superior to those in offshore facilities, yet individuals facing prolonged indefinite detention still face adverse mental health impacts due to factors such as constant uncertainty, loss of independence, the monotony of life in detention and concern about family members still living in dangerous situations overseas. These factors affect asylum seekers detained in the Nauru and Manus Island facilities but are likely to be further magnified due the extremely remote location of the facilities and the lack local capacity to provide services and support. Furthermore, both Amnesty International Australia and UNHCR have raised concerns that delays in processing and poor conditions in offshore facilities may compel people who are in genuine need of protection to return to their country of origin, potentially placing themselves at risk of torture, death or other serious human rights violations.

2.7. ***Non-discrimination (Article 26 of ICCPR):*** Offshore processing unduly discriminates against a particular group of asylum seekers based on their mode of arrival in Australia and their legal status. One of the key justifications for the policy is the so-called "no advantage" test, which seeks to prevent asylum seekers from gaining an "advantage" over refugees awaiting resettlement overseas. Not only does this argument reflect a fundamental misunderstanding of the nature and purpose of resettlement – which is to act as a complement to, not a substitute for, national asylum processes – but it is also applied on a discriminatory basis. Asylum seekers who arrive by plane with valid visas are not at risk of being processed offshore and those found to be refugees do not face any waiting period for the grant of a permanent visa, save the time required for normal security checks. The assertion that offshore processing targets boat arrivals so as to prevent asylum seekers from undertaking risky journeys is equally misguided. The nature of forced migration is such that most refugees risk their lives, safety or freedom in the search for protection, and it is unacceptable to penalise refugees and asylum seekers simply for taking risks. By this logic, most if not all of the refugees Australia resettles from overseas should face penalties on the basis that they undertook a risky journey to reach their country of first asylum. In RCOA's view, neither the "no advantage" test nor the "prevention of risky journeys" argument present a valid or reasonable basis for discrimination.

3. Implications of offshore processing for economic and social rights

3.1. RCOA is opposed to the offshore processing of asylum seekers to whom Australia has legal obligations but has particular concerns about the designation of Nauru and Papua New Guinea as offshore processing countries. We have serious doubts about the capacity of these two countries to uphold the economic and social rights of asylum seekers, given that both countries face existing challenges in upholding these rights for their own citizens.[7] While the Australian Government may provide support in areas such as health care and education, the institutional settings and lack of local capacity in Nauru and Papua New Guinea will inevitably militate against the full enjoyment of key economic and social rights, particularly for those facing long-term exile under the "no advantage" test. RCOA also has serious concerns about the mental health impacts of offshore processing and their implications for the enjoyment of the right to health.

3.2. ***Work (Article 7 of ICESCR):*** While it is understood that people found to be refugees by Nauru will be granted the right to work, it is questionable whether Nauru has the capacity to provide

[7] Comments in this section relating to the capacity of Nauru and Papua New Guinea to uphold human rights are based on AusAID (2012). *Why we give aid to Papua New Guinea*. Commonwealth of Australia, http://www.ausaid.gov.au/countries/pacific/png/Pages/why-aid.aspx; and AusAID (2012). *Why we give aid to Nauru*. Commonwealth of Australia, http://www.ausaid.gov.au/countries/pacific/nauru/Pages/why-aid.aspx

meaningful employment opportunities for refugees residing in its territory, particularly over the long term. According to AusAID, "there are high levels of unemployment [in Nauru], particularly among youth, and very few employment opportunities". Papua New Guinea currently has a reservation against Article 17(1) of the Refugee Convention, which requires states to grant refugees the same rights as other foreign nationals with regards to wage-earning employment.

3.3. ***Social security (Article 10 of ICESCR):*** Given that both Nauru and Papua New Guinea face significant challenges in meeting the basic needs of their own citizens, it is doubtful that either country has the capacity to provide adequate social security to refugees and asylum seekers. There is no formal welfare system in Nauru and Papua New Guinea is ranked by the United Nations Development Programme as a country with low human development[8], with around 40% of the population living in poverty. It is unclear how refugees facing long-term exile in Nauru and Papua New Guinea under the "no advantage" test will be able to support themselves (and family members living overseas) in the absence of social security and viable employment opportunities.

3.4. ***Adequate standard of living (Article 11 of ICESCR):*** As noted above, current living conditions in the Nauru and Manus Island facilities are so poor as to be tantamount to inhumane and degrading treatment. Furthermore, given that the living standards of much of the Nauruan and Papua New Guinean populations cannot be considered "adequate" from a human rights perspective, the capacity of both countries to ensure an adequate standard of living and a continuous improvement in living conditions for refugees, particularly in the long term, is highly questionable.

3.5. ***Physical health (Article 12 of ICESCR):*** Nauru and Papua New Guinea both face significant challenges in addressing the health needs of their citizens and are likely to have limited capacity to address the complex health issues which may arise in situations of forced displacement (such as combat- or torture-related injuries). While individuals suffering from serious health issues may be transferred to Australia for treatment, this can hardly be considered a sustainable approach, particularly for those facing long-term exile in Nauru and Papua New Guinea.

3.6. ***Mental health (Article 12 of ICESCR):*** Australia's previous experience with offshore processing under the Pacific Solution has shown this policy approach to be extremely detrimental to the mental health of asylum seekers and refugees. Throughout the life of the Pacific Solution, there were multiple incidents of self-harm, 45 detainees engaged in a serious and debilitating hunger strike and dozens suffered from depression or experienced psychotic episodes.[9] While there eventually may be some differences between the current incarnation of offshore processing and its predecessor (in that the facilities will not be closed detention centres, for example), the factors which had the greatest impact on mental health in the past – isolation, limited services and support, restricted freedom of movement, separation from family members and constant uncertainty – remain features of the current model. As such, there is little reason to believe that the mental health impacts can be avoided under the new regime, particularly in light of the fact that hunger strikes, self-harm and suicide attempts have already occurred in the new facilities. Even if mental health care in offshore facilities is enhanced, it is unlikely to have a significant impact while the individuals concerned remain living under the same conditions which caused or compounded their mental health issues. Furthermore, many of the individuals transferred to Nauru and Papua New Guinea are likely to have existing mental health issues resulting from pre-arrival experiences of torture and trauma, which neither country is likely to be able to address effectively given the lack of sufficient specialist expertise.

3.7. ***Education (Article 13 of ICESCR):*** While children currently detained in the Manus Island facility are receiving education delivered by Save the Children, they have not yet had an opportunity to

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[8] United Nations Development Programme (2013). *Human Development Report 2013.* New York: United Nations Development Programme, http://hdr.undp.org/en/media/HDR_2013_EN_complete.pdf

[9] Bem, K., Field, N., Maclellan, N., Meyer, S. & Morris, T. (2007). *A Price Too High: The cost of Australia's approach to asylum seekers.* A Just Australia, Oxfam Australia and Oxfam Novib, pandora.nla.gov.au/pan/76526/20070910-1523/www.oxfam.org.au/media/files/APriceTooHigh.pdf

attend school. It also remains unclear whether educational opportunities will be available to adults and young people of post-compulsory school age who are transferred to Nauru and Papua New Guinea. In any case, the capacity of both countries to provide meaningful educational opportunities is low: education outcomes in Nauru are considered poor by international standards and more than one third of Papua New Guinean children do not have access to primary education. In addition, Papua New Guinea has a reservation against Article 22 of the Refugee Convention, which requires states to provide refugees with the same level of access to primary education as nationals. Furthermore, given that many people from refugee backgrounds have a history of disrupted education and may be recovering from serious trauma, they often require more intensive support in educational settings –which, in all likelihood, Nauru and Papua New Guinea will find challenging to provide.

4. Human rights implications of changes to family reunion policy

4.1. Both the ICCPR (Article 23) and ICESCR (Article 10) emphasise the importance of the family unit and require states to provide protection and assistance to families, particularly for those with dependent children. In RCOA's view, recent changes to Australia's policies on humanitarian family reunion are fundamentally at odds with this principle. Not only do these changes fail to protect the family unit, they have been purposely designed to create a disincentive to boat journeys by increasing the complexity and arduousness of the family reunion processes and, in turn, prolonging family separation.

4.2. Since its inception, the Special Humanitarian Program (SHP) has been the main pathway through which refugee and humanitarian entrants have been able to reunite with both immediate and extended family members separated by displacement and resettlement. The program was originally designed to provide a more viable, timely pathway for family reunification for refugee and humanitarian entrants who, as a result of experiences specific to forced migrants, may struggle to meet the costs and eligibility requirements associated with the general migration program. The *Migration Amendment Regulation 2012 (No. 5)*, through restricting access to the SHP, will make it far more difficult for refugee entrants to reunite even with immediate family members.

4.3. Feedback gathered through RCOA's consultations with service providers and refugee background communities has revealed that the reassessment of SHP applications lodged by refugees who arrived by boat prior to 13 August 2012 will prolong family separation and may effectively remove the eligibility for immediate families to reunite. The Australian Government has clearly stated that SHP applications lodged by this group will be given the "lowest priority" in processing which, given the high demand for SHP visas, suggests that very few applications will be successful. Additionally, the discretionary nature of the "compelling reasons" criteria may be difficult for many refugees in this category to meet. For example, the reassessment has the potential to include a review of the extent of the applicant's connection to Australia and the person's settlement prospects. As many of the proposers are only recent arrivals and may not yet have established themselves in the community, applications may be refused on these grounds.

4.4. For refugees who arrived by boat after 13 August 2012 and thus are not eligible for the SHP, the only option for family reunification is the family stream of the general migration program. While additional places have been allocated to this program specifically for humanitarian entrants, other barriers remain which will limit the viability of this option for many refugee and humanitarian entrants, particularly those who have recently arrived in Australia. These barriers include the significant costs of visa fees and migration advice; documentation requirements which may be unachievable for forced migrants; restrictive eligibility criteria; uncertain and prolonged waiting periods; and lack of access to on-arrival settlement support.[10]

[10] For further information, see Section 4.5 of RCOA's submission on the 2013-14 Refugee and Humanitarian Program, available at http://www.refugeecouncil.org.au/r/isub/2013-14-IntakeSub.pdf.

4.5. The most likely impact of the changes to the SHP will be the indefinite and prolonged separation of large numbers of people from their immediate and extended family members. Feedback gathered from RCOA's consultations over a number of years indicates that prolonged separation can have a profound impact on the ability of families to reunite successfully. After many years apart, family roles and power dynamics necessarily change. For example, a young male may have taken on the role of head of the family and primary breadwinner in the absence of a father. Renegotiating these roles and expectations upon reunification can be difficult and highly stressful, potentially leading to family conflict and breakdown.

4.6. In addition to hampering successful reunification, prolonged family separation can have implications for the enjoyment of a range of other rights. For example, the imperative to financially support family members overseas may compel refugee entrants to seek employment below their skill level, compromising their longer-term prospects and ability to learn English; anxiety about family members living in difficult or dangerous circumstances overseas can compromise psychological health and wellbeing; and lack of family support can make it more difficult for refugee entrants to successfully negotiate the many challenges of settling in a new country and participate in broader social and cultural life.

4.7. RCOA is also greatly concerned that policies which block access to family reunion may have the unintended consequence of compelling family groups to undertake dangerous journeys to Australia. In light of this evidence outlined above in relation to the TPVs, we fear that the changes to humanitarian family reunion entitlements could in fact further compound the issue that they seek to prevent.

5. Relevance of Australia's obligations under the 1951 Refugee Convention

5.1. Australia's obligations under the 1951 Refugee Convention are closely related to its obligations under several core human rights treaties, particularly the ICCPR, ICESCR and CAT. Aside from a small number of provisions which enshrine rights specific to refugees, most of the Refugee Convention's provisions outline the degree of rights recognition which should be accorded to refugees, rather than enshrining rights per se. For example, parties to the Refugee Convention are required to accord to refugees the same rights as citizens with regards to elementary education and social security, but the same rights as other foreign nationals in relation to secondary and tertiary education, employment and freedom of movement.

5.2. For this reason, it is important to consider a country's obligations under the Refugee Convention in conjunction with its obligations under other human rights treaties, as the level of support and quality of protection provided to refugees depends largely on the extent to which other human rights are upheld. If a country does not have the will or capacity to protect the human rights of its citizens and foreign nationals residing in its territory, the level of support accorded to refugees – even if the country adheres to the letter of the Refugee Convention – is likely to be poor.

5.3. As discussed above, both Nauru and Papua New Guinea currently lack the capacity to uphold even the basic rights of their own citizens. As such, even if both countries have a serious commitment to upholding their Refugee Convention obligations, they are unlikely to be able to provide effective protection and sufficient support to refugees. This is particularly the case in Papua New Guinea, given that it has a significant number of reservations against key provisions of the Refugee Convention.

5.4. Also of significance is UNHCR's statement that "under international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory", including the Refugee

Convention.[11] According to this argument, the protection and support accorded to refugees in offshore facilities should be measured against Australian standards of human rights protection for citizens and foreign nationals, as under international law these refugees remain Australia's responsibility regardless of whether they are transferred to other countries. Clearly, these standards are not currently being met – and are unlikely to be met in the future – in offshore facilities.

5.5. There is also significant overlap between the non-refoulement provisions in the Refugee Convention, ICCPR and CAT. These obligations are discussed in further detail in the following section.

6. Non-refoulement

6.1. At present, it is difficult to assess the level of protection against refoulement in Nauru and Papua New Guinea, given that both countries are still developing processes and legal frameworks for refugee status determination and protection. However, we believe it is highly problematic for Australia to shift responsibility for status determination and protection to Nauru and Papua New Guinea before either country has developed sufficient capacity in these areas. Even if both countries have a genuine commitment to upholding their Refugee Convention obligations, the lack of experience and capacity amongst local officials and service providers is likely to hamper the implementation of robust, effective systems in the short-term, creating circumstances in which mistakes are more likely to be made – and refoulement is more likely to occur.

6.2. Given the limited capacity in Nauru and Papua New Guinea, it is likely that Australia will have significant involvement in refugee status determination procedures in both countries. However, Australia's past experiences under the Pacific Solution clearly demonstrate that Australian involvement is not a sufficient safeguard against refoulement. Asylum seekers transferred to Nauru and Papua New Guinea under the Pacific Solution had their claims assessed by Australia rather than local governments, but underwent a different – and far less robust – system of refugee status determination than that which applied on the Australian mainland. Access to legal advice was limited, there were significant concerns about assessment procedures and there was no independent scrutiny of decision-making. Many asylum seekers whose claims for protection were rejected under offshore status determination processes experienced persecution or serious threats to their safety and security after returning to their countries of origin.[12] As many as 20 of them are believed to have been killed.[13]

6.3. Additionally, as noted above, concern has been expressed that the untenable conditions in offshore facilities may compel people with genuine protection needs to return to situations of persecution or danger.

7. Children and minors

7.1. RCOA is particularly troubled by the potential impacts of the package of legislation on children and unaccompanied minors. RCOA cannot imagine any circumstances in which it can be in the best interests of the child to be denied the full protection of Australian law and transferred to

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[11] See UNHCR's 2012 statement on the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, available at http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277:unhcr-statement-migration-amendment-unauthorised-maritime-arrivals-and-other-measures-bill-2012&catid=35:news-a-media&Itemid=63

[12] See Glendenning, P., Leavey, C., Hetherton, M., Britt, M. & Morris, P. (2004). *Deported to Danger: A study of Australia's treatment of 40 rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education, www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=208; and Glendenning, P., Leavey, C., Hetherton, M. & Britt, M. (2006). D*eported to Danger II: The continuing study of Australia's treatment of rejected asylum seekers*. Edmund Rice Centre for Justice and Community Education, www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153

[13] Banham, C. (2008). "Afghans sent home to die." *Sydney Morning Herald*, 27 October, www.smh.com.au/news/national/afghans-sent-home-to-die/2008/10/26/1224955853319.html

an offshore processing facility for an indefinite period of time, particularly in light of the current conditions in offshore facilities.

7.2. In this regard, the removal of the Minister's guardianship responsibilities for unaccompanied minors transferred to offshore facilities is highly problematic. RCOA has previously raised concerns about the conflict of interest inherent in the Minister's role as guardian for unaccompanied minors, and we do not support this model of guardianship; however, we are alarmed by the prospect of unaccompanied minors being removed to offshore facilities, potentially for prolonged periods, without any clear guardianship arrangements in place. Again, we cannot imagine a circumstance in which this could be considered to be in the child's best interests.

7.3. Several provisions of CROC emphasise the importance of family unity, a principle which, as outlined above, is not supported by recent changes to family reunion policy. While unaccompanied minors who arrived before 13 August 2012 are exempt from these changes, those arriving on or after this date are not and will only be able to sponsor family members through the general migration program. This is likely to be exceedingly difficult for unaccompanied minors due to factors such as limited finances and long waiting times for parent visas (currently at least 15 years).[14]

8. Lack of adequate safeguards and oversight

8.1. As noted above, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* did not introduce, but in fact removed, meaningful safeguards to protect the human rights of asylum seekers and refugees subject to offshore processing. At present, the only conditions which must be met if the Minister is to designate a country of offshore processing is that he or she believes it is in the national interest to do so, and has considered whether the designated country has provided assurances (which need not be legally binding) that it will adhere to the principle of non-refoulement and allow access to refugee status determination procedures. There are no legally-binding requirements relating to minimum conditions in offshore processing facilities, mechanisms for status determination and protection, or treatment of vulnerable groups such as children, unaccompanied minors, pregnant women, people with disabilities or other complex health needs, or survivors of torture and trauma.

8.2. In RCOA's view, the "national interest" criterion sets an unacceptably low threshold for the designation of an offshore processing country, particularly given the potential impacts of such a designation on a highly vulnerable group of people. It does not represent a rights-based approach to policy – on the contrary, under the current legislation, satisfaction of the "national interest" criterion seems to obviate the need for serious consideration of human rights implications. Additionally, as noted above, the mechanism of parliamentary scrutiny does not present a sufficient safeguard against breaches of rights, as the current conditions in Nauru and Papua New Guinea patently demonstrate.

8.3. Given the lack of legal safeguards for and precarious circumstances of asylum seekers subject to offshore processing, monitoring and oversight is particularly important in ensuring the robustness of decisions regarding the designation of offshore processing countries and the protection of the rights of those subject to transfer. RCOA is therefore particularly concerned by apparent efforts to obstruct independent judicial review by exempting designations of offshore processing countries from the rules of natural justice. Furthermore, in RCOA's view, the Interim Joint Advisory Committee established to monitor conditions in the Nauru facility is not sufficiently robust or transparent. We are also note that there is currently no monitoring body tasked with overseeing conditions in the Manus Island facility.

8.4. RCOA strongly supports the establishment of more robust and transparent systems for the monitoring and oversight of transfers of asylum seekers to offshore processing countries,

[14] See http://www.immi.gov.au/migrants/family/parent-visa-processing-priorities.htm.

conditions in offshore processing facilities, refugee status determination, and protection of individuals found to be refugees. We believe that the establishment of these systems is essential to ensuring that the rights of refugees and asylum seekers are respected and upheld and that the support and services provided to these groups are in line with Australia's human rights obligations and relevant international standards. We also wish to note, however, that mechanisms for oversight are likely to be of limited effectiveness unless they are linked to clear pathways for resolving identified issues and seeking redress in cases where breaches of human rights have been identified.

9. Positive aspects of the package of legislation

9.1. While RCOA has serious concerns about much of the legislation under review, we also wish to acknowledge the potential positive impacts. Specifically, we welcome the introduction of discretion in the decision to grant work rights to Bridging Visa holders. Feedback from RCOA's consultations indicates that work rights are of central importance to the wellbeing of asylum seekers, both in terms of enabling asylum seekers to support themselves financially and in providing asylum seekers with a sense of purpose, stability and direction. While RCOA was dismayed by the Government's decision to remove eligibility for work rights for asylum seekers who arrived by boat after 13 August 2012, we nonetheless support its efforts to extend work rights to asylum seekers who arrived before this date.

9.2. RCOA also welcomes the *Migration Amendment (Health Care for Asylum Seekers) Bill 2012*. In light of the potentially dire mental health consequences of offshore processing (symptoms of which have already begun to emerge in offshore facilities) and the limited capacity of Nauru and Papua New Guinea to provide adequate health care, the establishment of a panel to monitor and report directly to Parliament and the Minister on the health of asylum seekers subject to offshore processing could provide an essential safeguard against negative health impacts. We wish to reiterate our concern, however, that mechanisms for oversight are not likely to be effective unless they are linked to clear pathways for redress, and we recommend that the legislation be amended to provide further clarity on this issue.

10. An alternative approach: Regional cooperation

10.1. As noted in the introduction to this submission, RCOA agrees that the loss of life resulting from dangerous sea journeys to Australia must be urgently addressed. However, we believe that there are alternative policy options available which are far more humane and constructive than Australia's current approach and which would strengthen, rather than undermine, human rights protections.

10.2. In RCOA's belief, the key to addressing dangerous boat journeys lies in improving the inadequate levels of protection faced by refugees and asylum seekers which compel them to search further afield to secure protection and safety. While Australia has taken some initial steps to improve the protection environment in the region – such as the increase to Australia's resettlement program and funding for capacity-building projects – there is a need to develop a more comprehensive, long-term and multifaceted strategy for working with states across Asia-Pacific to address the complex protection challenges faced by refugees and asylum seekers.

10.3. RCOA's submission to the Expert Panel on Asylum Seekers outlines a range of ideas and strategies for building regional cooperation on protection issues, using Australia's resettlement program strategically to broker solutions and enhancing access to family reunion, as well as short-term options to prevent loss of life at sea. We believe the approach set out in this submission presents an effective means of addressing protection challenges in the region, including dangerous boat journeys, while also upholding and indeed strengthening human rights.[15]

[15] RCOA's submission to the Expert Panel is available at http://www.refugeecouncil.org.au/r/sub/1207-Expert-Panel.pdf.